(2)

No. 03-807

Supreme Court, U.S.
FILED
JAN 5 - 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

CHAD SIGAFUS AND TERRI SIGAFUS,

Petitioners,

v.

ST. LOUIS POST DISPATCH, L.L.C., PULITZER PUBLISHING COMPANY, PULITZER MISSOURI NEWSPAPERS, INC., PULITZER INC., JOE HOLLEMAN, AND CAROLYN TUFT,

Respondents.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Rule 29 Corporate Disclosure

Pulitzer Inc. is the parent company of St. Louis Post-Dispatch L.L.C. Pulitzer Publishing Co. ceased to exist in 1999. Pulitzer Inc. is the parent company of Pulitzer Missouri Newspapers, Inc. Gabelli Asset Management, Inc. owns more than 10% of the common stock of Pulitzer Inc.

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JURISDICTION

This Court does not have jurisdiction of this case because Petitioners failed to file a timely application with the Missouri Supreme Court to have the case transferred from the Missouri Court of Appeals to the Missouri Supreme Court. As such, the Petition does not seek a writ to the highest state court in which a decision could be had.

SUMMARY OF THE ARGUMENT

Petitioners' Petition for Writ of Certiorari to the intermediate Missouri Court of Appeals should not be granted because Petitioners failed to use the proper procedure to request that the Missouri Supreme Court exercise its discretion to hear the underlying case. As a result of Petitioners' failure to use the proper procedure, the Missouri Supreme Court never considered whether to hear the case. Therefore, the decision Petitioners seek to have reviewed is not the decision of the highest court in which a decision could be had, which deprives this Court of jurisdiction.

The underlying case is a defamation action in which the trial court awarded summary judgment in favor of Respondents/Defendants. Petitioners appealed to the Missouri Court of Appeals, which affirmed the lower court's decision. Petitioners filed with the Missouri Court of Appeals an application for transfer of the case to the Missouri Supreme Court. The application was denied. Under Missouri rules, when the Court of Appeals denies an application for transfer, the party seeking transfer to the Missouri Supreme Court may then file a similar application directly with the Missouri Supreme Court.

Such an application must be filed within 15 days of the date on which the Missouri Court of Appeals denied the original application for transfer.

Petitioners did not file an application for transfer with the Missouri Supreme Court within 15 days of the order from the Missouri Court of Appeals denying transfer. Rather, Petitioners waited 90 days and filed with this Court their Petition for Writ of Certiorari to the Missouri Court of Appeals. After the Clerk of this Court informed Petitioners that they failed to seek transfer with the Missouri Supreme Court, Petitioners filed a request with the Missouri Supreme Court for leave to file out of time an application for transfer. The Missouri Supreme Court denied leave and never considered the application for transfer.

Because Petitioners failed to invoke simple procedures that would have resulted in the Missouri Supreme Court reviewing their application for transfer, the decision sought to be reviewed is not the decision of the highest court of Missouri in which a decision could be had. Therefore, this Court should deny the Petition for Writ of Certiorari.

ARGUMENT

This Court should not grant a writ of certiorari in the present case because it does not have jurisdiction to review the decision of the Missouri Court of Appeals. The writ being sought in this case would not go to the Missouri Supreme Court, which is the highest court in Missouri that could have rendered a decision. Rather, Petitioners seek a writ to an intermediate appellate court.

This Court "lack[s] jurisdiction to review" state court cases when the petitioner fails to ask the highest state court in which a decision could be had to review the judgment entered by a lower court. *Banks v. California*, 395 U.S. 708 (1969) (per curiam); *see also* 28 U.S.C. §1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .") This Court lacks jurisdiction in such cases even if the state court review that a petitioner passed up is discretionary. *Gotthilf v. Sills*, 375 U.S. 79, 79 (1963) (per curiam); *McMaster v. Gould*, 276 U.S. 284, 286-87 (1928); *Matthews v. Huwe*, 269 U.S. 262 (1925).

In the present case, prior to their initial attempt to file a Petition for Writ of Certiorari with this Court, Petitioners failed to file an application for transfer with the Missouri Supreme Court after the intermediate Court of Appeals denied an application for transfer. In Missouri, except in limited circumstances where an appeal may be taken as of right, appeals from the Missouri Court of Appeals to the Missouri Supreme Court are discretionary. After an adverse ruling in the Missouri Court of Appeals, a party can apply with that Court of Appeals for transfer of the case to the Missouri Supreme Court. Mo.R. Civ. P. 83.02. If such an application is denied, the party may then file a similar application with the Missouri Supreme Court. Mo.R. Civ. P. 83.04.

Petitioners' failure to timely apply for discretionary review with Missouri's highest court deprives this Court of jurisdiction over the present case. Many of this Court's precedents establish this governing rule of law. For instance, in *Gotthilf v. Sills*, this Court reviewed a case in which the New York County Supreme Court granted a

body execution against the petitioner, and the Appellate Division affirmed the decision on appeal. *Gotthilf v. Sills*, 375 U.S. at 79-80. The petitioner sought an appeal as of right with the Court of Appeals of New York, but that court dismissed the appeal because the underlying order did not finally determine the action. The petitioner also filed a motion in the Court of Appeals of New York for leave to appeal, but the motion was dismissed on the same grounds. *Id.* at 80. This Court granted certiorari, but then dismissed the writ as improvidently granted for want of jurisdiction. *Id.* This Court found that non-final orders could be taken to the Court of Appeals of New York by "leave of the Appellate Division upon certified questions." *Id.* However, the petitioner did not seek leave of the Appellate Division upon certified questions. Because the Appellate Division "was not the last state court in which a decision . . . could be had," its decision was not the decision of such a court. *Id.* (quoting *Gorman v. Washington Univ.*, 316 U.S. 98, 100 (1942)). Therefore, this Court did not have jurisdiction of the case.

In the present case, prior to filing their Petition for Writ of Certiorari with this Court, Petitioners filed an application with the Missouri Court of Appeals seeking transfer to the Missouri Supreme Court. That application was denied on July 3, 2003. *See* Petitioners' Appendix, p. a14. Under Missouri rules, an application for transfer filed with the Missouri Supreme Court "*shall* be filed with [the Missouri Supreme] Court within fifteen days of the date on which transfer was denied by the court of appeals." Mo.R. Civ. P. 83.04 (emphasis added). There is no provision for filing an application out of time. Fifteen days came and went and Petitioners did not file an application for transfer with the Missouri Supreme Court.

Ninety days after the Missouri Court of Appeals denied transfer (which was 75 days after Petitioners' time had run out to file with the Missouri Supreme Court), Petitioners filed (on October 1, 2003) their Petition for Writ of Certiorari with this Court. In *McMaster v. Gould*, this Court was faced with an almost identical situation. The petitioners had lost in front of the Appellate Division in New York and moved that court for leave to appeal to the Court of Appeals of New York. *McMaster v. Gould*, 276 U.S. at 285. Leave was denied. The petitioners then took an appeal without leave (assuming they could take it as of right), which was dismissed by the Court of Appeals of New York without opinion. *Id.* In New York, like Missouri, in certain special classes of cases, appeals may be taken from the Appellate Division to the Court of Appeals as of right. When the appeal does not fall within one of those special classes of cases, it may be taken when the Appellate Division certifies it for review or, if certification is denied, when "an appeal is allowed by the court of appeals." *Id.* at 286. This Court found that "the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the court of appeals for such leave." *Id.* As a result, this Court held that "the judgment is not that of the highest court of the state in which a decision could be had" and, therefore, dismissed the writ for want of jurisdiction. *Id.* at 287.

In the present case, this Court initially refused to docket the Petition for Writ of Certiorari because, according to the Clerk of this Court, the case was not "reviewed by . . . the highest state court in which a decision could be had." *See* Respondents' Appendix (attached hereto) at p. A-1 (letter from Supreme Court Clerk). In response, on October 17, 2003, Petitioners filed in the Missouri Supreme Court a

pleading entitled "Motion For Leave to File Application for Transfer to Missouri Supreme Court Out of Time." *See* Respondents' Appendix at pp. A-2 through A-5 (Motion for Leave filed with Missouri Supreme Court). At the same time, Petitioners filed the Application for Transfer, itself.

On October 23, 2003, the Missouri Supreme Court entered the following order: "Appellants' motion for leave to file application for transfer to the Missouri Supreme Court out of time [is] denied." *See* Respondents' Appendix at p. A-6 (Letter from Clerk of Missouri Supreme Court). Although, contemporaneously with their motion for leave to file out of time Petitioners filed an Application for Transfer to the Missouri Supreme Court, that application was never ruled on because leave to file out of time was denied.[1]

In *Gotthilf*, *McMaster* and *Matthews v. Huwe*, this Court determined that it did not have jurisdiction over appeals from state courts when the highest state court refused to hear an appeal because the petitioner failed to use the proper procedure to request such a hearing, even though such hearings were discretionary. In those cases, the petitioners sought an appeal as of right, but did not make all requests for discretionary appeal. In the present case, Petitioners failed to request a discretionary appeal

[1] The denial is not surprising given the state of the law in Missouri. The time limitations for filing applications when a Missouri Court of Appeals has rendered a decision are "cast in mandatory language and neither counsel nor the court is at liberty to ignore or wink at that limitation." *See, e.g.*, *Hood v. M.F.A. Mutual Ins. Co.*, 379 S.W.2d 806, 813 (Mo. App. S.D. 1964), *quoted in Hoevelman v. Reorganized School District R2 of Crawford County*, 452 S.W.2d 298, 303 (Mo. App. S.D. 1970) (per curiam).

within the applicable time constraints. Similar to the highest state courts in *Gotthilf*, *McMaster* and *Matthews*, the Missouri Supreme Court did not rule on Petitioners' Application for Transfer. Rather, the Missouri Supreme Court denied leave to file the Application for Transfer, which was out of time.

Because the Missouri Supreme Court never ruled on an Application for Transfer and because Petitioners failed to properly request that it do so, the Missouri Court of Appeals is not the highest state court in which a decision could be had. As a result, the decision sought to be reviewed is not the decision of the highest state court, and this Court may not exercise its certiorari powers pursuant to 28 U.S.C. §1257(a). *See also Stratton v. Stratton*, 239 U.S. 55 (1915). In *Stratton*, this Court explained that it cannot exercise jurisdiction by assuming what would have been the response of a highest state court in the event it had properly "been called upon to exert the discretion vested in it by state laws." *Id.* at 56. In other words, even if review by a state's highest court is purely discretionary, if that review is not properly sought then a writ of certiorari should not issue from this Court.

CONCLUSION

This Court does not have jurisdiction of this case because Petitioners failed to file a timely application with the Missouri Supreme Court to have the case transferred from the Missouri Court of Appeals to the Missouri Supreme Court. Because of Petitioners' failure, the Petition to this Court does not seek a writ to the highest state court

in which a decision could be had. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

BENJAMIN A. LIPMAN
Counsel of Record
MICHAEL P. CASEY
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St. Louis, Missouri 63102
(314) 444-7600
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Attorneys for St. Louis Post Dispatch, L.L.C., Pulitzer Publishing Company, Pulitzer Missouri Newspapers, Inc., Pulitzer, Inc., Joe Holleman and Carolyn Tuft

APPENDIX

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SUPREME COURT OF THE UNTIED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER October 8, 2003 AREA CODE 202
CLERK OF THE COURT 479-3011

Dennis Owens
7th Fl., Harzfeld's Building
1111 Main St.
Kansas City, MO 64105

RE: Chad Sigafus, et ux. v. St Louis Post Dispatch, et al.

Dear Mr. Owens:

The above-entitled petition for a writ of certiorari was postmarked October 1, 2003 and received October 7, 2003. The papers are returned for the following reason(s):

Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28 USC 1254 and 1257.

Returned are 39 copies of the petition and check #101083 in the amount of $300.

Sincerely,
William K. Suter, Clerk
By: /s/ [Illegible]

S. Elliott
(202) 479-3025

IN THE MISSOURI SUPREME COURT

CHAD SIGAFUS and TERRI SIGAFUS,	)	
Appellants,	)	
v.	)	No. ___
ST. LOUIS POST DISPATCH, L.L.C., PULITZER PUBLISHING COMPANY, PULITZER MISSOURI NEWSPAPERS, INC., PULITZER, INC., JOE HOLLEMAN, And CAROLYN TUFT,	)	
Respondents.	)	

APPELLANTS' MOTION FOR LEAVE TO FILE APPLICATION FOR TRANSFER TO MISSOURI SUPREME COURT OUT OF TIME

Appellants, Chad Sigafus and Terri Sigafus, by and through counsel undersigned, hereby request leave to make application for transfer to this Court pursuant to Missouri Supreme Court Rule 83.04, out of time. In support, Appellants state:

1. The Missouri Court of Appeals, Eastern District issued its Opinion on April 1, 2003.

2. Appellants timely filed an application for transfer to the Missouri Court of Appeals, Eastern District pursuant to Missouri Supreme Court Rule 83.02.

3. The Court denied the application on July 3, 2003. Exhibit A.

4. Counsel for Appellants incorrectly believed this ruling to be final for purposes of appeal to the Missouri courts system, and timely filed a Petition for Writ of Certiorari to the United States Supreme Court on October 1, 2003.

5. By letter dated October 8, 2003 (which was received by undersigned counsel on October 14, 2003) to co-counsel Dennis Owens, the United States Supreme Court returned Appellants Petition for Writ of Certiorari because Appellants had not technically appealed to, and been rejected by, this Court. Exhibit B.

6. Appellants ask this Court, over Respondents objections, to consider on their application for transfer under Missouri Supreme Court Rule 83.04.

/s/ [Illegible]
Robert C. Seibel, #44062
Mark J. Dean, #44079
SEIBEL & ECKENRODE, P.C.
7711 Bonhomme Ave., Ste. 400
St. Louis, MO 63105
(314) 726-6670 (Telephone)
(314) 726-2016 (Telecopier)
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was mailed, postage prepaid, U.S. Mail, this 17 day of October, 2003, to the following party: **Robert B. Hoemeke, Michael P. Casey, John M. Hessel, Joseph E. Martineau, Benjamin A. Lipman**, Lewis, Rice & Fingersh, P.C., 500 N. Broadway, Ste. 200, St. Louis, MO 63102, Attorneys for Respondents St. Louis Post-Dispatch, L.L.C., Pulitzer Publishing Company, Pulitzer Missouri

Newspapers, Inc. and Pulitzer, Inc.; **Eastern District Court of Appeals**, Wainright State Office Building, Ste. 350, 111 North Seventh Street, St. Louis, MO 63101.

/s/ Mark Dean
Mark Dean

EXHIBIT A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER October 8, 2003 AREA CODE 202
CLERK OF THE COURT 479-3011

Dennis Owens
7th Fl., Harzfeld's Building
1111 Main St.
Kansas City, MO 64105

RE: Chad Sigafus, et ux. v. St Louis Post Dispatch, et al.

Dear Mr. Owens:

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Returned are 39 copies of the petition and check #101083 in the amount of $300.

Sincerely,
William K. Suter, Clerk
By: /s/ [Illegible]

S. Elliott
(202) 479-3025

EXHIBIT B

[LOGO]

In the Missouri Court of Appeals

Eastern District

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: July 3, 2003

RE: Application For Transfer To Supreme Court Denied

1. ED81268 CHAD SIGAFUS, ET AL, APP V. STL POST DIS ET AL, RES

[LOGO]

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

October 23, 2003

Mr. Robert C. Seibel
Mr. Mark J. Dean
Suite 400
7711 Bonhomme Avenue
St. Louis, MO 63105

In Re: Chad and Terri Sigafus, Appellants, vs. St. Louis Post-Dispatch, L.L.C., et al., Respondents.
Missouri Supreme Court No. SC85642
Eastern District No. ED81268

Dear Counsel:

Please be advised that the Court entered the following order on this date in the above-entitled cause:

'Appellants' motion for leave to file application for transfer to the Missouri Supreme Court out of time denied."

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:

✓Mr. Robert Hoemeke, Mr. Michael Casey, Mr. John Hessell, Mr. Joseph Martineau and Mr. ✓Benjamin Lipman
Clerk, Eastern District Court of Appeals